LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAR 8 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted] 31

BALTIMORE CONTRACTORS, INC.,
Petitioner,

vs.

JACOB H. BODINGER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

MORRIS ROSENBERG,
Baltimore, Maryland,

GEORGE BRUSSEL, JR.,
New York City,
Attorneys for Petitioner.

The Daily Record Co., Baltimore 3, Md.

INDEX

Subject Index

PAGE

Petition for Writ of Certiorari:

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statement of the Case 2

Reasons for Granting Writ of Certiorari 3

Brief in Support of Petition:

Opinions Below 5

Jurisdiction 5

Question Presented 5

Statutes Involved 5

Statement of Case 6

Specifications of Error 6

Summary of Argument 7

Argument:

An Order Denying a Stay Under Section 3 of the United States Arbitration Act Should be Regarded as an Interlocutory Injunction Appealable Under 28 USCA 1292(1) 8

Conclusion 17

TABLE OF CASES CITED IN PETITION FOR WRIT OF CERTIORARI

	PAGE
Hudson Lumber Co. v. U. S. Plywood Corp., 181 F. 2d 929	4
Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449	2

STATUTES CITED IN PETITION FOR WRIT OF CERTIORARI

Title 9, United States Code Annotated: Section 3	2, 3
Title 28, United States Code Annotated: Section 1254(1)	2

TABLE OF CASES CITED IN BRIEF

Agostini Bros. Bldg. Corp. v. U. S., 142 F. 2d 854	16
American Locomotive Co. v. Chemical Research Corp., 171 F. 2d 115	13
Bowles v. Commercial Cas. Ins. Co., 104 F. 2d 169	14
Donahue v. Susquehanna Collieries Co., 138 F. 2d 3	15
Enelow v. New York Life Ins. Co., 293 U. S. 379	8, 10
Ettelson v. Metropolitan Life Ins. Co., 317 U. S. 188	8, 10
Hudson Lumber Co. v. U. S. Plywood Corp., 181 F. 2d 929	7, 13
International Union v. Colonial Hardwood Floor Co., 168 F. 2d 33	12
Lewittes & Sons v. United Furniture Workers of America C.I.O., 95 F. Supp. 851	16
March v. Romare, 116 F. 354	9
Markel Elec. Products v. United Elec. R. M. W. of Am., 202 F. 2d 435	7, 13
Morgantown v. Royal Ins. Co., 337 U. S. 254	10
O'Malley v. Chrysler Corp., 160 F. 2d 35	14

PAGE

Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449 ..... 7, 9, 12, 15

Shoenamsgruber v. Hamburg American Lines, 294 U. S. 454 ..... 16, 17

U. S. v. Horns, 147 F. 2d 57 12

STATUTES CITED IN BRIEF

Act of 1891, Section 7 (26 Stat. 828) 8

Act of February 18, 1895, c. 96 (27 Stat. 666) 8

Title 9, United States Code Annotated:

Section 3 ..... 5, 16

Title 28, United States Code Annotated:

Section 227 (1940) 9

Section 1254(1) 5

Section 1292(1) 6, 7, 8, 9

Sections 397, 398 10

MISCELLANEOUS CITATIONS IN BRIEF

Moore's Commentary on the U. S. Judicial Code (1949 ed.) par. 0.03 (52) pp. 492-494 8

Moore's Commentary on the U. S. Judicial Code, p. 42, Note 15 in Subhead (5) 9

Moore's Commentary on the U. S. Judicial Code, pp. 493-494 10

Moore's Commentary on the U. S. Judicial Code, p. 491 15

2 Moore's Federal Practice (1948 ed.) par. 2.05 [2], p. 336, etc. 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. ------

BALTIMORE CONTRACTORS, INC.,
Petitioner,

vs.

JACOB H. BODINGER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case.

Opinions Below

The opinion of the District Court (R. 21-22) is not reported. There was no opinion by the United States Court of Appeals for the Second Circuit which by an order dismissed petitioner's appeal (R. 22).

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22) and the jurisdiction of this Court is invoked under 28 USCA 1254 (1).

Question Presented

In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, which was an *action at law*, this Court held that an interlocutory order denying a stay under Section 3 of the United States Arbitration Act (9 USCA 3) should be regarded as a denial of an injunction from which an appeal lies. The question presented here is:

Whether in an action for an *accounting* an interlocutory order denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an injunction from which an appeal lies.

Statement of the Case

This action for an accounting and for a judgment for a share of net profits under an agreement was commenced by Jacob H. Bodinger, respondent, in the Supreme Court of the State of New York, County of New York in April 1953 and was removed by petitioner to the United States District Court for the Eastern District of New York on grounds of diversity of citizenship (R. 3, 6-7, 13, 18).

Paragraph "Third" of the written agreement sued on in part provides (R. 18, 8, 22):

> "In the event of any dispute in the calculation of the net profits under this paragraph Frenkil (referring to petitioner's president) shall select either Wooden and Benson or Haskins and Sells or an accountant or aud-

itor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute."

Petitioner moved for a stay of the action (R. 3, 21) pursuant to the provisions of section 3 of the United States Arbitration Act (9 USCA) authorizing such a stay "upon any issue referable to arbitration under an agreement in writing for such arbitration."

On November 4, 1953 the District Court passed an order denying petitioner's application for a stay pending arbitration (R. 5-6) from which order petitioner took an appeal to the United States Court of Appeals for the Second Circuit (R. 4) on November 9, 1953.

On December 7, 1953, respondent moved the Court of Appeals for an order dismissing the appeal on the ground that the order appealed from was not an appealable order (R. 1, 2). On December 11, 1953 the Court of Appeals granted respondent's motion to dismiss the appeal by entering an order reading "Motion granted. See *Morgantown v. Royal Ins. Co.*, 337 U. S. 254" (R. 22).

By an order of this Court entered on December 29, 1953, all proceedings before the District Court were stayed pending timely filing and disposition of this petition for certiorari.

Reasons for Granting the Writ

1. The question has not been decided by this Court.

2. The United States Courts of Appeals to which the question has been put are not in agreement. The decision of the Second Circuit in this case holding that such an order is not appealable is in direct conflict with the decision of

the Ninth Circuit in *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, holding that such an order is an appealable order.

3. The decision of the Second Circuit is contrary to the intent of Congress in that it precludes appellate review of an Arbitration Act order which the Congress regarded as an injunction.

4. This case involves an important question of federal law which should be settled by this Court.

5. It should be reviewed also because it has been incorrectly decided by the Court below for the reasons given in support of this petition.

WHEREFORE, for the foregoing reasons and for the reasons and authorities in the brief annexed hereto, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

MORRIS ROSENBERG,

GEORGE BRUSSEL, JR.,

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

There was no opinion by the United States Court of Appeals for the Second Circuit and the memorandum opinion of the United States District Court for the Eastern District of New York appears in the record (R. 21-22).

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22) and the jurisdiction of this Court is involved under 28 USCA 1254(1).

Question Presented

Whether an order, entered in an action for an accounting, denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an interlocutory injunction from which an appeal lies?

Statutes Involved

9 USCA 3 (U. S. Arbitration Act):

> *"Stay of proceedings where issue therein referable to arbitration*
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Title 28 USCA section 1292 (1):

'Interlocutory decisions

"The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, * * *;".

Statement of the Case

This action for an accounting, based on a written agreement between the parties, was commenced by respondent in the Supreme Court of the State of New York, County of New York and was removed by petitioner to the United States District Court for the Eastern District of New York on the ground of diversity of citizenship (R. 3). Petitioner applied for a stay of proceedings under Section 3 of the United States Arbitration Act on the ground that the matters in dispute were subject to arbitration under the written agreement (R. 3). The District Court passed an order denying petitioner's application for a stay (R. 5-6) from which petitioner appealed to the United States Court of Appeals (R. 4) which dismissed the appeal on the ground that no appeal lies from the District Court's order denying the stay under Section 3 of the Federal Arbitration Act (R. 2, 22). A lengthier statement of the facts, which are not in dispute, appears in the petition for certiorari at pages 2-3.

Specifications of Error

Although the Court of Appeals rendered no opinion, the petitioner contends that the following points have been erroneously decided:

(1) That under 28 USCA 1292 (1) an appeal does not lie from the order of the District Court in this case denying petitioner's application for a stay made under the provisions of Section 3 of the United States Arbitration Act (9 USCA 3).

(2) That under 28 USCA 1292 (1) such an order, though appealable when entered in an action at law, is not appealable when entered in an action for an accounting.

(3) That under 28 USCA 1292 (1) the denial of a stay under Section 3 of the United States Arbitration Act in an action for an accounting is not regarded as an interlocutory injunction for purposes of appeal.

Summary of Argument

Ever since 1935, when this court decided *Shanferoke C. & S. Corp. v. Westchester S. Corp.*, 293 U. S. 449, an order granting or refusing a stay under Section 3 of the United States Arbitration Act has been regarded as an interlocutory injunction for purposes of appeal; i.e., as an appealable order under the provisions of the Judicial Code now consolidated in 28 USCA 1292 (1). This was so whether the action sought to be stayed was brought on the law side or the equity side of the district court. See in *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, where the action was on the "equity side" and *Markel Elec. Products v. United Elec. R. M. W. of Am.* (CA 2) 202 F. 2d 435, where the action was on the "law side." The Court of Appeals for the Second Circuit, however, in the instant case has ruled that an Arbitration Act order is not appealable when the action is brought on the equity side.

Respondent in his argument below conceded that in an action at law an Arbitration Act order is appealable but

sought to draw a distinction between an action at law and one in equity, relying on the fictional injunction theory applied in *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, and in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188.

The fiction of *Enelow* and *Ettelson* seem to have been done with by the majority of this Court in *Morgantown v. Royal Ins. Co.*, 337 U. S. 254, (see *Moore's Commentary on The U. S. Judicial Code* (1949 ed.) par. 0.03 (52) pp. 492-494). But whether or not that fiction still prevails, petitioner contends that an Arbitration Act stay order is not a stay granted under an equity court's inherent power to maintain orderly processes of justice in causes before it but is an interlocutory injunction for purposes of appeal because the granting or refusing of a stay can cause irreparable injury to the aggrieved party which cannot be undone by an appeal from the final order or decree in the case and because the Congress intended that such an order should be an interlocutory injunction for purposes of appeal.

ARGUMENT

An Order Denying a Stay Under Section 3 of the United States Arbitration Act Should be Regarded as an Interlocutory Injunction Appealable Under 28 USCA 1292(1).

A brief resumé of the history of 28 USCA 1292 (1), under which interlocutory injunctions are appealable is significant. When the circuit courts of appeals were established by the Act of 1891, section 7, provision was made for an appeal from an "interlocutory order or decree granting or continuing" such an injunction (26 Stat. 828). The section was amended by the Act of February 18, 1895, c. 96, 27 Stat. 666 to give an appeal where an interlocutory injunction was *refused* or *dissolved*. Although this additional

provision for appeal was repealed by the Act of June 6, 1900, 21 Stat. 1899, 1900 (*March v. Romare* (CA 5) 116 F. 354), it was restored in the broadest terms by section 129 of the Judicial Code, 28 USCA 227 (1940) and is substantially carried forward as 28 USCA 1292(1). See *Moore's Commentary on the U. S. Judicial Code* (1949 ed.) page 42, note 15 in subhead (5).

The first case in which this Court passed on the appealability of an order denying a stay under Section 3 of the United States Arbitration Act was *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, an action at law for damage for breach of a contract. Mr. Justice Brandeis, speaking for the Court there said (p. 451): "Being an interlocutory order, it was appealable to the Circuit Court of Appeals under § 129, only *if the denial of the stay should be deemed the denial of an injunction*" (italics supplied). The denial of the stay was held to be the denial of an injunction. Applying the theory of *Enelow v. New York L. Ins. Co.*, 293 U. S. 379, the opinion stated that: "an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274 b. U. S. C. title 28, § 398, is appealable under § 129; * * * and that the motion for a stay is an application for an interlocutory injunction based on the special defense" (293 U. S. 452).

What is known as an "equitable defense" stemmed from the old English chancery practice under which the law-defendant with the basis went into equity as a plaintiff and obtained an injunction against the law-plaintiff from further prosecuting his law action. If the law action was stayed pending final determination of the equity action, the law-defendant was granted an interlocutory injunction which in *fact* was issued by the chancellor.

But in federal practice, separate law and equity courts have never existed although there was a law and an equity side which was not completely changed by The Law & Equity Act of 1915 (28 USCA 397, 398) (see 2 Moore's Federal Practice, (1948 ed.) par. 2.05 [2]), p. 336 etc.).

In the *Enelow* case, an equitable defense was interposed on the law side of the court and the equitable issues were set down for trial prior to the legal issues on the theory that an interlocutory injunction had been granted against the action at law although in *fact* none had been issued.

Later, even after the Federal Rules had united law and equity, thereby abolishing the law and equity side, the fictional injunction of the *Enelow* case was again used in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, in a similar situation and the interlocutory order was held to be an interlocutory injunction, and therefore appealable.

Then came *Morgantown v. Royal Ins. Co.*, 337 U. S. 254, where the theory of the *Enelow* case and the fictional injunction could have been but was not applied by the majority of this Court. This was an action for reformation of an insurance policy on the basis of mutual mistake; the defendant denied mistake and filed a counterclaim to recover on the policy as written. After issue was joined on the counterclaim, the defendant filed a demand for a jury trial under Rule 38 (b) and the district court granted the plaintiff's motion to strike the demand and set the case for trial by the court without a jury. On appeal, the court of appeals refused to treat the interlocutory order as an order granting or denying an injunction and dismissed the appeal. This Court affirmed. It could have, according to Professor Moore,* "applied historical analogies and

* *Moore's Commentary on The U. S. Judicial Code*, pp. 493-494.

reached the same result: that an order denying the defendant a jury trial on his counterclaim at 'law' interposed in plaintiff's suit in 'equity' in advance of the plaintiff's equitable issues was not an injunction by a chancellor, but a mere stay of the legal proceedings by a common law judge. [This is the position taken by Justice Frankfurter in his concurring opinion.] Mr. Justice Murphy speaking for the majority of the Court did not choose to do so. While he did not expressly overrule *Enelow* and *Ettelson* his theory and language impliedly do. 'This is not a situation, he stated, where a "chancellor" in denying a demand for jury trial can be said to be enjoining a "judge" who has cognizance of a pending action at law. This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed. The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from common-law practice which supported our conclusions in the *Enelow* and *Ettelson* cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one.' [Justices Black and Rutledge dissenting regard the case as overruling *Ettelson v. Metropolitan Ins. Co.*]".

But whether or not the theory of the *Enelow* case has been overruled by implication, it is submitted that the true test of appealability of the order is not whether the action was commenced "at law" rather than "in equity", as respondent contends, but whether the order in substance

invokes the normal equitable principles underlying the injunctive process. If it is the latter, it should be regarded as an injunction.

It should first be observed that an Arbitration Act order granting or refusing a stay is not a stay "granted by virtue of the (equity) court's inherent power to control the progress of the cause pending before it so as to maintain the orderly processes of justice" [*U. S. v. Horns* (CA 3) 147 F. 2d 57, 60]. It is a *statutory* stay granted by the Congress which has declared that the district courts shall not entertain a suit brought in violation of a written agreement to arbitrate. (*Shanferoke* case, *supra*, 293 U. S. 449). As such it involves the *injunctive process* and has been regarded as an interlocutory injunction for purposes of appeal in the following cases:

(1) *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33 pp. 34-35 (CA 4): "The defendants moved for a stay of proceedings pursuant to section 3 of the United States Arbitration Act, 9 U.S.C.A. § 3, on the ground that the contract upon which suit was instituted provided for arbitration of the matters in suit. The District Court denied the stay, holding that the contract did not provide for arbitration of these matters and that the United States Arbitration Act had no application because of the exclusion clause contained in the first paragraph thereof. The defendants have appealed from this order; and we think it clear that the denial of stay in such case is, in effect, the denial of an interlocutory injunction, from which immediate appeal lies to this court. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 St. Ct. 313, 79 L. Ed. 583; Enelow v. N. Y. Life Ins. Co., 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440."

(2) *American Locomotive Co. v. Chemical Research Corp.*, 171 F. 2d 115, 119, (CA 6): "[1] The orders [denying stay of proceedings under the Arbitration Act] from which the appeals are taken are not final but are appealable interlocutory orders within the provisions of 28 U.S.C.A. §§ 225 (b) and 227, recodified as of September 1, 1948 as 28 U.S.C.A. § 1292 (1). Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; Gatliff Coal Co. v. Cox, 6 Cir., 142 F. 2d 876."

(3) *Markel Electric Products, Inc. v. United Electrical, Radio & Machine Workers of America, U. E. et al.*, 202 F. 2d 435, 437, (CA 2): "[1] Such an order is appealable since it is the equivalent of the denial of an injunction. Enelow v. New York Life Ins. Co., 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., 4 Cir., 168 F. 2d 33."

(4) *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, 930 (an action on the *equity* side): "The order stayed the trial of the action on application of appellees pursuant to 9 U.S.C.A. § 3. Such a stay is, in effect, an injunction. Hence the order was appealable" [citing the *Enelow* case, *supra*, 293 U. S. 379; the *Shanferoke* case, *supra*, 293 U. S. 449; the *International Union* case, *supra*, 168 F. 2d 33; the *American Locomotive* case, *supra*, 171 F. 2d 115 and *Gatliff Coal Co. v. Cox* (CA 6) 142 F. 2d 876].

The case at bar is the first, to our knowledge, in which a court of appeals has ruled that an order issued under Section 3 of the United States Arbitration Act is not appealable and it is in direct conflict with the *Hudson Lumber* case, *supra*.

The ruling of the Second Circuit, we submit, not only creates an irrational result but is unsound in principle and is contrary to the intent of Congress.

It creates an irrational result because it permits the party who brings suit in violation of the arbitration agreement to determine the injunctive character of an Arbitration Act order. Had respondent in the present case merely sued for damages, it was conceded that the order denying the stay would have been appealable but by seeking an accounting as well as damages it is contended that the order is not appealable.

But more important still is the fact that the function of arbitration would be defeated, if the order is not appealable. If defendant must first answer and proceed with an accounting in compliance with legal rules of evidence, it would become pointless on appeal from the final order to assert the simpler and less costly and less technical trial by the arbitrators. The damage — costly litigation — would have been done.

The order denying the stay, therefore, was not administrative in character such as one requiring a party to submit to a physical examination (*Bowles v. Commercial Cas. Ins. Co.* (CA 4) 107 F. 2d 169) or to furnish certain data to the adverse party (*O'Malley v. Chrysler Corp.* (CA 7) 160 F. 2d 35), which are not appealable. The order here, in effect, is an injunction denying enforcement of substantial arbitral rights. The test is succinctly stated by Professor Moore as follows: "An order requiring a defendant to do or refrain from doing something that is an integral part of the very matter in litigation, and invokes the normal equitable principles underlying the injunctive process should be regarded as an injunction: final if completely determinative of the matter in litigation, otherwise interlocutory in

character" (*Moore's Commentary on The U. S. Judicial Code* (1949 ed.) p. 491).

This Court has already said that it was the intent of Congress to *enjoin* controversies by Section 3 of the United States Arbitration Act even though arbitration could not *be compelled; Shanferoke, supra*, 293 U. S. pp. 452-453: "* * * Section 3 of the United States Arbitration Act provides broadly that the court may 'stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.' We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with § 4 of the Act. *Marine Transit Corp. v. Dreyfus*, 284 U. S. 263, 274, 76 L. ed. 282, 288, 52 S. Ct. 166, is not to the contrary. There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel the arbitration. For otherwise, despite congressional approval of arbitration, it would be impossible to secure a stay of an action in the federal courts when the arbitration agreement provides for compulsory proceedings exclusively in the state courts; since only in exceptional circumstances may a state court enjoin proceedings begun in a federal court."

In accordance with this ruling it was said in *Donahue v. Susquehanna Collieries Co.* (CA 3) 138 F. 2d 3, at page 5: "* * * in § 3 the statute deals with the conduct of suits in federal courts, again a subject matter of congressional power. The language becomes general: 'any suit or proceeding', upon 'any issue referable to arbitration under an agreement in writing for such arbitration' are the words. Congress is not limited, in legislating as to law suits in

federal courts, to those suits involving matters where the substantive rights of the parties may be controlled by federal legislation. The generality of the language used in the statute does not suggest any self-imposed limitation. Nor do we think that the 'congressional approval of arbitration' should be so limited by implication, by a grudging type of construction carried down from the days of judicial hostility to all arbitration agreements. We think it clear that the provisions of § 3 are not to be limited to the specific instances dealt with in §2."

To the same effect see: *Agostini Bros. Bldg. Corp. v. U. S.*, 142 F. 2d 854 and *Lewittes & Sons v. United Furniture Workers of America*, CIO, 95 F. Supp. 851.

By Section 3 of the Arbitration Act, Congress has seen fit to deny access to the federal courts to a suitor who goes to court in violation of an agreement to arbitrate and by that section has directed the district courts in proper cases to stay such an action pending arbitration. Petitioner therefore submits that whenever this limitation on the jurisdiction of the district courts is invoked under Section 3, any order granting or denying a stay is in substance an interlocutory injunction.

In the court below, respondent also relied on *Shoenamsgruber v. Hamburg American Lines*, 294 U. S. 454, which, we submit, is distinguishable from the case at bar. There an *admiralty* action was brought against a steamship company for damages on account of personal injuries inflicted upon an infant passenger. The company denied the material allegations of the libel and set up an arbitration agreement as the basis for a stay under Section 3 of the Arbitration Act. The libelants opposed the application for a stay claiming that the child was carried as a passenger not under

the contract alleged in the steamship company's answer, but under another contract that contained no provision for arbitration. The court ordered the parties to arbitrate and granted a stay of the admiralty action pending the filing of the award. The Court of Appeals held that the interlocutory stay order was not appealable and this Court affirmed because courts of *admiralty* do not issue *injunctions* except in a limitation of liability proceeding. The Court there said (pp. 457-458): "While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions."

Not being regarded as an injunction, the stay order in the *Shoenamsgruber* case was obviously not appealable under the provisions of subsection (1) of Section 1292 of the Judicial Code. Finally, none of the other cases relied on below by respondent involved a stay under the Arbitration Act.

CONCLUSION

Both the language of Section 3 of the United States Arbitration Act and the interpretation put upon it by this Court make it clear that an order granting or denying a stay under the provisions of that section is regarded as an interlocutory injunction for purposes of appeal.

It is therefore respectfully requested that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

MORRIS ROSENBERG,

GEORGE BRUSSEL, JR.,

Attorneys for Petitioner.